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No. 99-1185

IN THE
Supreme Court of the United States

MARK SELING, Superintendent
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI* STATES IN SUPPORT OF WASHINGTON

CARLA J. STOVALL
Kansas Attorney General
(Counsel of Record)
STEPHEN R. MCALLISTER
Kansas State Solicitor
JARED S. MAAG
Assistant Attorney General
120 S.W. 10th Avenue
Topeka, KS 66612-1597
(785) 296-2215

Counsel for the Amici States

[Additional Counsel Listed After Conclusion]

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INTERESTS OF THE *AMICI* CURIAE

The *Amici* States submit this brief in support of Petitioner, Washington, which is seeking review of the Ninth Circuit's decision that Washington's Sexually Violent Predator Act may be challenged through an "as applied" approach for double jeopardy and *ex post facto* purposes. *See Young v. Weston*, 176 F.3d 1196, *amended by*, 192 F.3d 870 (9th Cir. 1999).

Kansas, as well as other *Amici* States, have virtually identical statutes which involve the commitment of sexually violent predators. In a direct challenge to the validity of this type of law, this Court has already held that Kansas' sexually violent predator act violated neither the double jeopardy nor *ex post facto* clauses of the United States Constitution. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

Instead of deferring to this Court's decision in *Hendricks*, the Ninth Circuit ignored this Court's reasoning and improvidently created an "as applied" approach for double jeopardy and *ex post facto* analysis. The Ninth Circuit's decision flies in the face of this Court's reasoned and well established analysis in *Hendricks* as well as in *Hudson v. United States*, 522 U.S. 93 (1997).

In addition to Kansas and Washington, fourteen other states currently have a sexually violent predator act in place.[1] All these States therefore have a shared interest in preserving the integrity of these acts. Moreover, the impact of the Ninth Circuit's decision in *Young* will not only adversely affect the

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[1] Those states are: Arizona (Ariz. Rev. Stat. §§ 36-3701 — 36-3716), California (Cal. Welf. & Inst. Code § 6600), Florida (Fla. Stat. Ann. §§ 394.910-394.929), Illinois (725 Ill. Comp. Stat. Ann. 207), Iowa (Iowa Code § 229A), Massachusetts (Mass. Gen. Laws ch. 6, §§ 178C-178P), Minnesota (Minn. Stat. § 253B.185 & 253B.02, subds. 18b & 18c), Missouri (Mo. Rev. Stat. § 632.480 - 632.513), New Jersey (N.J. Rev. Stat. § 30:4-27.26), North Dakota (N.D. Cent. Code § 25-03.3), South Carolina (S.C. Code Ann. § 44-48-10), Texas (Tex. Health & Safety Code Ann. § 841), Virginia (Va. Code Ann. § 37.1-70 (1950), as amended and Wisconsin (Wis. Stat. ch. 980).

existing sexually violent predator acts around the country, but may hinder or discourage those states which may be considering similar legislation from going forward. It is further possible that the Ninth Circuit's decision will yield negative ramifications in the arena of traditional involuntary civil commitments, which would directly impact all states.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN BOTH *KANSAS v. HENDRICKS* AND *HUDSON v. UNITED STATES*.

Given the concerns over a "wide variety of novel double jeopardy claims" that arose following *United States v. Halper*, 490 U.S. 435 (1989), this Court, in *Hudson v. United States*, 522 U.S. 93 (1997), revisited the issue of whether a particular sanction should be deemed criminal or civil for double jeopardy purposes. *Hudson*, 522 U.S. at 98. In the instant matter, the Ninth Circuit has substantiated a novel double jeopardy claim in establishing that an "as applied" analysis of Washington's Sexually Violent Predator law may in turn invalidate that law pursuant to the *ex post facto* and double jeopardy clauses of the United States Constitution. *Young v. Weston*, 192 F.3d 870 (9th Cir. 1999). This decision by the Ninth Circuit should not go unchecked as it runs counter to this Court's explicit instruction in *Hudson* that a statute's effect is to be considered in relation to the statute "on its face." 522 U.S. at 100. Furthermore, the Ninth Circuit's decision misapplies the Court's reasoning in *Kansas v. Hendricks*, 521 U.S. 346 (1997) when it relied on particular language out of that decision to create an entirely impracticable "as applied" approach to double jeopardy and *ex post facto* analysis.

In *Hudson*, as well as *Hendricks*, this Court fully articulated the proper analysis to determine whether a

particular governmental sanction implicates the Double Jeopardy Clause. Initially, a court questions whether the legislature "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." 522 U.S. at 99 (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)). If the law purports to be civil on its face a presumption arises that the statute is civil. *See Hendricks*, 521 U.S. at 361. The presumption can be overcome only if the challenging party demonstrates "by the clearest proof" that the statutory scheme is "so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 99-100 (internal citations omitted). To that end, the factors enunciated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) "provide useful guideposts." *Hudson*, 522 U.S. at 99. However, this Court made it abundantly clear that the *Kennedy* factors "must be considered in relation to the statute on its face." *Id.* at 100. It is from this latter, and highly significant, point that the Ninth Circuit has deviated.

In holding that the conditions of respondent's confinement may render Washington's statute punitive as applied to him, the Ninth Circuit has fashioned a decision where one may challenge civil commitment laws based solely on the conditions of his confinement, thus rendering meaningless this Court's requirement that such challenges be considered "in relation to the statute on its face." *Id.* at 100. This constitutes a marked detour from well established Supreme Court precedent.[2]

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[2] Equally flawed was the lower court's decision to address respondent's claims under 28 U.S.C. § 2254. Given that respondent's argument centers solely on the conditions of his confinement, the appropriate remedy for respondent's claim is found in 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475, 484-86 (1973). Respondent's appeal does not imply the invalidity of his commitment as a sexual predator because he is simply contesting the conditions of his confinement. *See Heck v. Humphrey*, 512 U.S. 477, 487 (1994); *Edwards v. Balisok*, 520 U.S. 641,

The Ninth Circuit relies primarily on this Court's decision in *Hendricks* for the position that an "as applied" analysis is appropriate for double jeopardy and *ex post facto* purposes. As a basis for this conclusion, that Court pointed specifically to the fact that both the majority and concurring opinions in *Hendricks* "turn repeatedly to the question whether the conditions of Hendricks's confinement rendered the Kansas statute punitive." *Young*, 192 F.3d 874. Consequently, the Ninth Circuit attributes a great deal of significance to the actual conditions that respondent lives under, thus establishing a separate, and misdirected, review of a state's law for double jeopardy and *ex post facto* purposes. The Ninth Circuit simply failed to appreciate the context within which this Court reviewed Hendricks's conditions of confinement. Though conditions were addressed in the decision, such a discussion was simply part and parcel of a facial analysis of the Kansas statute. The intent of the legislative body was clearly the overriding concern. *Hendricks*, 521 U.S. 362-369. In particular, this Court maintained that the "effect" of the statutory scheme is reviewed simply to determine whether a rejection of the "legislature's manifest *intent*" to deem a law civil is warranted. *Id.* at 361 (emphasis added). It follows therefore that a challenge to one's conditions may not be addressed outside of a facial analysis given that such conditions are addressed within the context of legislative intent. The only inquiry, in accordance with both *Hendricks* and *Hudson*, is whether Washington's Sexually Violent Predator law *on its face* is so punitive that it must be considered criminal.

For all practical purposes the Ninth Circuit has carved out an exception to the proper facial analysis of a statute by attributing meaning to language within *Hendricks* that is simply not there. Contrary to the Ninth Circuit's assertion in this case,

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648 (1997). Accordingly, his claim is not cognizable under 28 U.S.C. § 2254.

Hendricks did not leave open the possibility of an "as applied" approach. Quite the opposite. *Hendricks* clearly disposes of the issue given that the only reasonable interpretation is that conditions of confinement are addressed solely within an evaluation of legislative intent. Consequently, the decision in *Young* could be summarily reversed because there is no support in this Court's precedents for an "as applied" approach to double jeopardy and *ex post facto* challenges to a statute.

Indeed, any doubt on this point was completely erased when this court overruled *United States v. Halper* as unworkable. *Hudson*, 522 U.S. at 101-102. In finding that the *Halper* decision had improperly "elevated" a single *Kennedy* factor, this Court reaffirmed the import of the *Kennedy* decision that no one factor should be considered controlling. *Id.* at 101. More importantly, however, was this Court's finding that *Halper* had, contrary to *Kennedy's* command, "assessed the character of the actual sanctions imposed." *Id.* at 101-102. This test established by *Halper*, as the Court noted, "has proved unworkable." *Id.* at 102. Unfortunately, the Ninth Circuit ignored this Court's overruling of *Halper* and has attempted to resurrect the *Halper* approach, maintaining that the validity of an "as applied" analysis is found not only in *Hendricks* but *Allen v. Illinois*, 478 U.S. 364 (1986) as well. *Young*, 192 F.3d at 874, n. 4. Neither *Hendricks* nor *Allen* provide for such analysis, as this Court made clear in *Hudson*.

In short, this Court has unequivocally announced that for double jeopardy and *ex post facto* purposes, consideration of a statute's effect is part and parcel of the analysis of the statute on its face. *Hudson*, 522 U.S. at 100. An "as applied" approach, as utilized by the Ninth Circuit in this matter, does not exist under this Court's precedents and is simply unworkable as this Court explained when it overruled *Halper*. More importantly, this Court's decision in *Hendricks* lends absolutely no support to the position that an "as applied"

approach can be fashioned apart from a facial analysis of a state's civil commitment law. *Hendricks* makes clear that assessing respondent's conditions of confinement is necessary only to determine whether the legislature's intent in passing the law was punitive, which is part of resolving a facial challenge to the statute.

II. THE NINTH CIRCUIT'S DECISION IN *YOUNG v. WESTON* POTENTIALLY IMPLICATES ALL CIVIL COMMITMENT LAWS, NOT JUST SEX PREDATOR STATUTES.

It is unquestionable that if left to stand, *Young v. Weston* will be relied upon by similarly situated respondents throughout the United States.[3] It is further safe to assume that such challenges will arrive not only from civilly committed sexual predators but from a full range of those who have been involuntarily confined through some sort of civil process.[4] Reversal of the *Young* decision is therefore necessary to maintain uniformity within this particular area of law. Indeed, the State of Washington has been placed in the difficult position of having mutually antagonistic decisions on whether an "as

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[3] The decision in *Young* will now provide an alternative means of attack for civilly committed persons to challenge otherwise valid commitment laws which have already been found not to violate double jeopardy. *See e.g., In re Linehan,* 594 N.W.2d 867, 871 (Minn.) (The SDP Act does not contravene double jeopardy), *cert. denied sub nom.* 120 S. Ct. 587 (1999); *In re M.D.,* 598 N.W.2d 799, 806 (N.D. 1999) (N.D.Cent. Code. § 25-03.3 does not violate double jeopardy).

[4] *See e.g, In re Indefinite Detention Cases,* No. CV 98-674 TJH (JWJX), 2000 WL 95306, *3-4 (C.D.Cal. Jan. 27, 2000) where the Court there addressed involuntary commitment procedures outlined in *Foucha v. Louisiana,* 504 U.S. 71 (1992). Given the approach the Court of Appeals takes in *Young v. Weston,* it is reasonable to conclude that those subject to deportation may look to *Young* in an effort to challenge their indefinite confinement pending repatriation.

applied" approach is necessarily possible. *See In re the Detention of Turay,* 139 Wash.2d 379, 421, 986 P.2d 790, 812, *as amended on denial of reh'g* (1999) (rejecting the Ninth Circuit's approach). Given this situation, a civilly committed predator in the State of Washington can rest assured that he may find success in federal court after having been denied relief by the Washington state courts, thus rendering the state court's review immaterial. This situation alone demands summary reversal.

Notwithstanding the need for uniformity, the fact remains that the Ninth Circuit's decision in *Young* provides untenable support for a challenge to one's conditions of confinement. Such a challenge is provided for within 42 U.S.C. § 1983, not 28 U.S.C. § 2254. It does not follow that concerns or questions about a predator's treatment conditions must lead to his release. A remedy of that sort is far too broad in response to a claim of unlawful conditions. 42 U.S.C. § 1983 provides the necessary remedy for appropriate claims in such circumstances. If not reversed, the Ninth Circuit's decision in *Young* will consequently lend credence to the availability of federal *habeas* review to challenge conditions of confinement, with the remedy not being correction of unconstitutional conditions but rather release from confinement altogether.

The Ninth Circuit's decision has far reaching implications. Most importantly, *Young* provides an inappropriate avenue for challenging the states' civil commitment laws outside of the approach this Court delineated in *Hendricks* and *Hudson.*

The *Amici* States respectfully submit that the Ninth Circuit's decision in *Young v. Weston* must be reversed.

CONCLUSION

The *Amici* States request that Washington's Petition for a Writ of Certiorari be granted and that the Ninth Circuit's decision be summarily reversed or, in the alternative, that the case be set for plenary review.

Respectfully submitted,

CARLA J. STOVALL
Kansas Attorney General
(Counsel of Record)
STEPHEN R. MCALLISTER
Kansas State Solicitor
JARED S. MAAG
Assistant Attorney General
120 S.W. 10th Avenue
Topeka, KS 66612-1597
(785) 296-2215

Counsel for Amici States

BILL PRYOR
Attorney General
State of Alabama

JANET NAPOLITANO
Attorney General
State of Arizona

MARK PRYOR
Attorney General
State of Arkansas

BILL LOCKYER
Attorney General
State of California

KEN SALAZAR
Attorney General
State of Colorado

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

JAMES E. RYAN
Attorney General
State of Illinois

THOMAS J. MILLER
Attorney General
State of Iowa

THOMAS F. REILLY
Attorney General
State of Massachusetts

JENNIFER M. GRANHOLM
Attorney General
State of Michigan

MIKE MOORE
Attorney General
State of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

BETTY D. MONTGOMERY
Attorney General
State of Ohio

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

MIKE FISHER
Attorney General
State of Pennsylvania

CHARLES M. CONDON
Attorney General
State of South Carolina

MARK BARNETT
Attorney General
State of South Dakota

MARK L. EARLEY
Attorney General
State of Virginia

JAMES E. DOYLE
Attorney General
State of Wisconsin

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